

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds:

The Award entered by the Administrative Law Judge should be reversed.

As indicated in its Order dated March 18, 1996, the Appeals Board finds that claimant's injury involves the structures of the hip and that the injury has significantly reduced that hip's range of motion. Because the hip is not listed in the schedule contained in K.S.A. 1992 Supp. 44-510d, claimant's right to permanent partial disability benefits is governed by K.S.A. 1992 Supp. 44-510e(a) which provides, in part:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment. . . . There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

Only one doctor testified regarding claimant's permanent work restrictions and limitations. Only one labor market expert testified regarding the effect of claimant's injury upon his ability to perform work in the open labor market and his ability to earn a comparable wage. Daniel Zimmerman, M.D., the physician selected by claimant's attorney to evaluate claimant, testified that claimant had an 18 percent whole body functional impairment and should limit occasional lifting to 20 pounds and frequent lifting to 10 pounds, and avoid frequent bending, stooping, squatting, and crawling. Claimant's human resources expert, Jerry D. Hardin, indicated that based upon Dr. Zimmerman's restrictions, claimant had lost 65 to 70 percent of his ability to perform work in the open labor market and that he retains the ability to earn approximately \$200 per week which is approximately 70 percent less than claimant's \$664 average weekly wage.

Claimant's treating physician, board-certified orthopedic surgeon Paul D. Lesko, M.D., did not specify what permanent restrictions claimant should observe. However, because his 1 to 2 percent functional impairment rating to the hip and lower extremity was significantly lower than Dr. Zimmerman's 44 percent rating, the Appeals Board believes his restrictions, likewise, would be less restrictive and prohibitive. Under the principles set forth in *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991) the nature and extent of disability is a question of fact to be determined by the fact finder who is free to consider all of the evidence and decide for itself the percentage of disability. Because Dr. Zimmerman's functional impairment appears inordinately high, being some 22 times higher than Dr. Lesko's, the Appeals Board believes that Dr. Zimmerman's restrictions are also overstated. Therefore, the Appeals Board finds both claimant's loss of ability to perform work in the open labor market and loss of ability to earn comparable wages are less than the percentages provided by Mr. Hardin. Based upon that belief, the Appeals Board finds that claimant has lost approximately 35 percent of his ability to perform work in the open labor market and 35 percent of his ability to earn a comparable wage. Averaging both losses yields a work disability of 35 percent which the Appeals Board finds appropriate to award permanent partial disability benefits.

The respondent and Workers Compensation Fund argue that claimant should be limited to permanent partial disability benefits based upon functional impairment only because claimant retired. The Appeals Board disagrees. Based upon claimant's testimony, the Appeals Board finds that claimant's attempt to return to work for the respondent after his accident was unsuccessful. Claimant was sent home on two occasions because of difficulties with the pain medication he was given. Claimant testified that he was then given the option of taking early retirement or being terminated. Those facts do not establish a basis upon which to limit claimant's benefits. In addition, the cases of *Lynch v. U.S.D. No. 480*, 18 Kan. App. 2d 130, 850 P.2d 271 (1993) and *Brown v. City*

of Wichita, 17 Kan. App. 2d 72, 832 P.2d 365, rev. denied 251 Kan. 937 (1992) hold that voluntary retirement does not affect an individual's right to receive permanent partial general disability benefits.

The Appeals Board hereby adopts the findings and conclusions set forth in its Order entered in this proceeding dated March 18, 1996.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge John D. Clark dated March 21, 1996, should be, and hereby is, reversed; that claimant is entitled to receive permanent partial general disability benefits for an injury sustained on August 11, 1992, based upon an average weekly wage of \$664.00 for a 35 percent permanent partial general disability.

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Joe E. Brown, and against the respondent, Boeing Military Airplane Company, and its insurance carrier, Aetna Casualty & Surety Company, and the Workers Compensation Fund, for an accidental injury which occurred August 11, 1992, and based upon an average weekly wage of \$664.00 for 3.96 weeks of temporary total disability compensation at the rate of \$299.00 per week or \$1,154.14, followed by 411.04 weeks at the rate of \$154.94 per week or \$63,868.54 for a 35 percent permanent partial general disability, making a total award of \$64,840.68.

As of August 31, 1996, there is due and owing claimant 3.96 weeks of temporary total disability compensation at the rate of \$299.00 per week or \$1,154.14, followed by 207.61 weeks of permanent partial disability compensation at the rate of \$154.94 per week in the sum of \$32,167.09 for a total of \$33,321.23 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$31,519.45 is to be paid for 203.43 weeks at the rate of \$154.94 per week, until fully paid or further order of the Director.

Claimant is entitled to his outstanding, unauthorized medical expense incurred for treatment of the August 11, 1992, injury. In addition, claimant is entitled to future medical care and treatment upon proper application, notice, hearing, and approval by the Director.

The expenses of administration as listed by the Administrative Law Judge in his awards are to be paid by the respondent and Workers Compensation Fund. Also, as stipulated by those parties, the Workers Compensation Fund is responsible for 50 percent of the costs and benefits associated with this Award.

IT IS SO ORDERED.

Dated this ____ day of September 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Russell B. Cranmer, Wichita, KS
Frederick L. Haag, Wichita, KS
Marvin R. Appling, Wichita, KS

JOE E. BROWN

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DOCKET NO. 173,507

John D. Clark, Administrative Law Judge
Philip S. Harness, Director